FOR ARGUMENT

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - Petitioner

versus

HAROLD WHORTON - - - - - Respondent

On Petition For A Writ of Certiorari To The
Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

HAROLD WHORTON - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY BRIEF FOR PETITIONER

THE DECISION OF THE KENTUCKY SUPREME COURT IN *WATSON* v. *COMMONWEALTH*, KY., ___ S. W. 2d ___ (RENDERED FEB. 27, 1979) DOES NOT RENDER MOOT THE CASE AT BAR.

In a Suggestion of Mootness and in his Brief, the respondent contends that the case at bar is now moot in light of a recent decision of the Kentucky Supreme Court in *Watson* v. *Commonwealth*, Ky., ___ S. W. 2d ___ (rendered Feb. 27, 1979), wherein the court concluded,

> "In Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error

> doctrine. We chose simple prophylaxis over Talmudic hair splitting. See Darnell v. Commonwealth, Ky., 558 S. W. 2d 590, 596 (1977) (Lukowsky, J., dissenting). We perceive no reason to retreat from Whorton, supra." (Petitioner's Appendix to Reply Brief, p. . .).

The petitioner respectfully submits that the foregoing does not moot the case at bar.

The petitioner has previously maintained in its Brief on the Merits that the Kentucky Supreme Court in *Whorton* v. *Commonwealth,* Ky., 570 S. W. 2d 627 (1978), has misinterpreted and misapplied the decision of this Court in *Taylor* v. *Kentucky,* 436 U. S. 478 (1978), to the case *sub judice.* Compare *Republic Steel Corp.* v. *Maddix,* 379 U. S. 650, 652 (1965); *Oregon* v. *Mathiason,* 429 U. S. 492 (1977). The thrust of petitioner's argument is twofold: (1) that *Taylor* v. *Kentucky, supra,* is limited to its own facts, creating no new constitutional requirement, and is necessarily of narrow application and, (2) *alternatively,* if *Taylor* v. *Kentucky, supra,* does establish a new constitutional requirement necessitating that an instruction on presumption of innocence must be given when requested to avoid constitutional error, regardless of the circumstances, then the *Chapman-Harrington* Rule[1] should be applied.

The application of the *Chapman-Harrington* Rule presupposes that an error of federal constitutional magnitude has in fact occurred. Thus, the absence of a federal constitutional error having occurred, one does

[1] *Chapman* v. *California,* 386 U. S. 18 (1967) and *Harrington* v. *California,* 395 U. S. 250 (1969).

not reach the issue of whether the *Chapman-Harrington* Rule should or should not be applied to this case. Here, there is no need for this Court to reach the *Chapman-Harrington* Rule issue since the most striking aspect of the Kentucky Supreme Court's misinterpretation is their conclusion that this Court in *Taylor* allegedly created a "newly-declared constitutional requirement" that "when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S. W. 2d at 632-633.

It is the petitioner's position that the decision in *Taylor* v. *Kentucky, supra,* did not create any newly-declared constitutional requirement that a rejected instruction on presumption of innocence requires automatic reversal of a state conviction. To the contrary, it appears quite clear that the Opinion in *Taylor* v. *Kentucky* is limited to its own facts and conspicuously avoids creating any constitutional requirement mandating that state courts must instruct on the presumption of innocence. Thus, the holding in *Whorton* that the failure to give a requested instruction on presumption of innocence requires automatic reversal on federal due process grounds, is based upon a faulty premise.

Perusal of the *Taylor* Opinion clearly establishes that it was only due to the cumulative effect of many potentially damaging factual circumstances occurring during the course of the trial, which diluted Taylor's "constitutional right to be judged solely on the basis of proof adduced at trial," that gave rise to a violation of the due process guarantee of fundamental fairness in the absence of an instruction on presumption of in-

nocence. Petitioner maintains that in the absence of similar extraordinary circumstances as those which occurred in the *Taylor* case, no constitutional error occurs, and there would be no constitutional necessity for a state trial court to grant a requested instruction on presumption of innocence.

Given such negative circumstances, the purging effect of such an instruction, was necessary in *Taylor* v. *Kentucky* as one means of protecting Taylor's constitutional right to be judged solely on the basis of proof adduced at trial. On the other hand, examination of the facts in the instant case unequivocally establishes that no such negative circumstances occurred here as in *Taylor*. Therefore, on its facts, the case at bar does not rise to federal constitutional magnitude. Accordingly, since this case did not involve a federal constitutional error, there is no need to reach the issue of whether or not the *Chapman-Harrington* Rule should apply.

Assuming *arguendo* that the issue of whether or not the *Chapman-Harrington* Rule should be applied to the case at bar is reached, the petitioner acknowledges that the refusal of the Kentucky Supreme Court in the *Watson* case to apply that Rule may very well constitute the creation by that court of a state standard more favorable to an accused than any federal constitutional protections which might be accorded by *Taylor* v. *Kentucky*. There appears to be nothing in the *Chapman-Harrington* Rule which would necessarily preclude a state court from deciding, as a matter of state law, that a particular federal constitutional

concept or principle is a ground for automatic reversal of a criminal conviction. However, the petitioner feels it necessary to point out that there is no language in the *Whorton* decision which would support the subsequent holding of the Kentucky Supreme Court, seven months later, in *Watson* v. *Commonwealth, supra,* that in *Whorton* the Kentucky Supreme Court refused to apply the *Chapman-Harrington* Rule as a matter of state law. To paraphrase the Kentucky Supreme Court in the *Whorton* case, it would have been considerate of that court to have indicated somewhere in *Whorton* that, as a matter of state law, it did not intend to apply the *Chapman-Harrington* Rule to cases involving the rejection of a requested instruction on presumption of innocence. After all, it might have reasonably been foreseen that the refusal to apply the harmless-error rule would have adverely effected a large number of cases in the Commonwealth of Kentucky.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the instant case is not moot.

Respectfully submitted,

ROBERT F. STEPHENS
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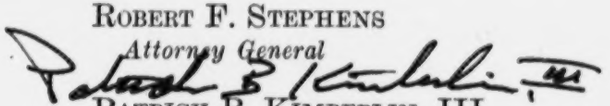

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, Counsel for the Petitioner, hereby certify that three (3) copies of the foregoing Reply Brief for Petitioner were mailed, postage prepaid, this 4th day of April, 1979, to Hon. Terrence R. Fitzgerald, Chief Appellate Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson, Louisville, Kentucky 40202, Counsel for Respondent.

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APPENDIX

RENDERED: FEBRUARY 27, 1979

SUPREME COURT OF KENTUCKY

78 SC 300 MR

CHARLES RAY WATSON - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Pulaski Circuit Court
Honorable Phillip K. Wicker, Judge
Nos. 77-F-932, 77-F-933, 77-F-934, 77-F-935

OPINION OF THE COURT BY JUSTICE LUKOWSKY—REVERSING

Watson was convicted of four counts of first-degree wanton endangerment, KRS 508.060, two counts of theft by unlawful taking of property of a value over $100.00, KRS 514.030, and five counts of terroristic threatening, KRS 508.080. He was sentenced to five years' imprisonment on each wanton endangerment count, one year on each theft count and twelve months on each terroristic threatening count. The wanton endangerment sentences were to be served consecutively. The remaining sentences were to be served concurrently with each other and the wanton endangerment sentences. He appeals. We reverse and remand.

Watson drove his car into a ditch. Police officers, Mike Walters and Homer Wesley, arrested him for public drunk-

enness and placed him in the rear of the police cruiser. They also arrested Watson's brother for public drunkenness and placed him in the rear of the police cruiser. They did not handcuff either of the men. The police told the other people present at the scene that they were free to leave. They returned to their cruiser and noticed that a shotgun and a nightstick were missing. Watson pointed the shotgun at the police officers and ordered them to let him and his brother out of the cruiser. He threatened to kill the police officers if they did not follow his instructions or if they attempted to use the radio. Watson then held the police officers and Hiram Daulton, Charles Daulton and Darrell Brock, who were also present at the scene of the accident, hostage and directed them to get his car out of the ditch. The hostages all safely made their escape when Watson's attention was diverted. Watson fired four shots at them as they fled. Fortunately, all the shots missed. Watson took the police cruiser and fled the scene. He was arrested the next day.

Watson contends that under the facts of this case KRS 505.020 prohibits his conviction of both wanton endangerment and terroristic threatening of the same persons.

KRS 505.020 (1) (a) provides:

> "When *a single course of conduct* of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense when: (a) One offense is included in the other, as defined in subsection (2)." (Our italics.)

KRS 505.020 (2) (d) provides:

> "A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

> (d) It differs from the offense charged only in the respect that a less serious injury or *risk of injury* to the same person, property or public interest suffices to establish its commission." (Our italics).

In order to convict on the terroristic threatening counts the jury had to believe that Watson threatened to shoot Mike Walters, Homer Wesley, Charles Daulton, Hiram Daulton and Darrell Brock with a shotgun. In order to convict on the wanton endangerment counts the jury had to believe that Watson fired a shotgun at Mike Walters, Homer Wesley, Hiram Daulton and Darrell Brock. The only difference between the threat and the act in this case is the increased risk of injury to Mike Walters, Homer Wesley, Hiram Daulton and Darrell Brock. Consequently, Watson should not have been convicted of the terroristic threatening of these men after he had been convicted of wantonly endangering them. Simply put, the terroristic threat is included in the wanton endangerment. Cf. Luttrell v. Commonwealth, Ky., 554 S. W. 2d 75, 78 (1977).

However, we are unable to protect Watson's rights by merely vacating four of the terroristic threatening convictions, because at trial he requested and was refused an instruction on the presumption of innocence. Our decision in Whorton v. Commonwealth, Ky., 570 S. W. 2d 627 (1978), cert. granted sub nom. Kentucky v. Whorton, 47 U.S.L.W. 3450 (1979), entitles him to a new trial on all charges of which he was convicted.

The Commonwealth urges us to overrule our decision in Whorton, supra, and apply the "Chapman-Harrington Harmless Error Doctrine." In Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error doctrine. We chose simple prophylaxis over Talmudic hair splitting. See Darnell v. Commonwealth, Ky.,

558 S. W. 2d 590, 596 (1977) (Lukowsky, J., dissenting). We perceive no reason to retreat from Whorton, supra.

The judgment is reversed and the cause is remanded to the Pulaski Circuit Court for further proceedings consistent herewith.

All concur except Aker, J., who did not sit.

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